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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN GONZALES,

Defendant and Appellant.

B237078

(Los Angeles County  
Super. Ct. No. KA093029)

APPEAL from the judgment of the Superior Court of Los Angeles County. Mike Camacho, Judge. Affirmed.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb and Esther P. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Juan Gonzales was charged by information with two felony counts of driving under the influence (Veh. Code, §§ 23152, subd. (a), count 1; 23152, subd. (b), count 2), with prior driving under the influence convictions (Veh. Code, §§ 23152, subd. (b), 23550, 23550.5), as well as prior strike and prison term allegations (Pen. Code, §§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i), 667.5, subd. (b)). Defendant pled no contest to counts one and two, and admitted his strike adjudication and prison terms. He moved to dismiss the strike under *Romero*,<sup>1</sup> on the basis that it arose from a juvenile adjudication many years earlier, when he was only 17. After denying defendant's motion to dismiss the prior strike allegation, the trial court sentenced defendant to five years in prison, consisting of the midterm sentence of two years on count 2, doubled under the Three Strikes law, plus a one-year enhancement for his prison prior (one of his prison priors was dismissed). The trial court also imposed and stayed a two-year term on count 1. On appeal, defendant contends it was unconstitutional to use his juvenile adjudication as a strike, and that the trial court abused its discretion when it denied his motion to dismiss the juvenile strike adjudication. We find no merit in either of defendant's contentions and therefore affirm.

## DISCUSSION

### 1. Constitutional Claims

Defendant contends his juvenile adjudication, although it satisfies the statutory requisites of a strike (Pen. Code, §§ 667, subd. (d)(3), 1170.12, subd. (b)(3)), could not constitutionally be considered a strike because in juvenile adjudications, the court and not a jury is the factfinder. Defendant relies on a number of federal cases, including *U.S. v. Tighe* (9th Cir. 2001) 266 F.3d 1187, for the proposition that the holding in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) requires a prior strike conviction to be obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt. (See *id.* at p. 490 [“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be

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<sup>1</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

submitted to a jury, and proved beyond a reasonable doubt.”]; *Tighe, supra*, 266 F.3d at p. 1194.) However, in *People v. Nguyen* (2009) 46 Cal.4th 1007, our Supreme Court rejected defendant’s constitutional claim, finding *Apprendi* does not prohibit the use of juvenile adjudications to enhance a criminal penalty, even though they are not tried to a jury. Our Supreme Court concluded that “under *Apprendi*, any ‘fact’ that allows enhancement of an adult defendant’s maximum sentence for the current offense must . . . be determined by a jury in the current case. [¶] . . . The statutorily relevant sentencing ‘fact’ . . . is whether [a] defendant’s record includes a prior adjudication of criminal conduct that qualifies, under the Three Strikes law, as a basis for enhancing his current sentence. . . . [T]he literal rule of *Apprendi* . . . required only that a jury in the current proceeding determine the existence of such an alleged prior adjudication.” (*Nguyen, supra*, 46 Cal.4th at p. 1015, italics omitted.) Therefore, defendant had the right to a jury trial in this case to decide whether his record included the juvenile adjudication of criminal conduct that qualifies as a strike. But, like the defendant in *Nguyen*, defendant expressly waived his right to a jury trial in this case. (*Id.* at p. 1011.) Defendant acknowledges that *Nguyen* controls here, but contends it “was wrongly decided.” We are bound by *Nguyen*, and find that it forecloses defendant’s claim. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

## **2. Romero Motion**

Defendant also complains that the trial court abused its discretion when it denied his motion to dismiss his juvenile strike adjudication. He contends that the strike crime, which happened 19 years before sentencing in this case, was too remote, and that he does not fall within the spirit of the Three Strikes law, because of his “otherwise good character” and because his current crimes are nonserious and nonviolent. We disagree, and find no abuse of discretion.

Trial courts have discretion under Penal Code section 1385 to dismiss Three Strikes allegations in the furtherance of justice. We review the trial court’s decision under the abuse of discretion standard of review. (*Romero, supra*, 13 Cal.4th at p. 530; *People v. Carrasco* (2008) 163 Cal.App.4th 978, 992-993.) The burden is on the party

attacking the sentence to show the sentencing decision was an abuse of discretion. In the absence of such a showing, the trial court is presumed to have acted appropriately, and a sentence will not be set aside on review. (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.) An abuse of discretion occurs only when the trial court was not aware of its discretion to dismiss, where the court considered impermissible factors, or where the defendant clearly falls outside the spirit of the Three Strikes law. (*People v. Scott* (2009) 179 Cal.App.4th 920, 926.) The analysis is whether, in light of the nature and circumstances of the present crimes and prior qualifying conviction, and defendant's background, character, and prospects, he may be deemed outside the spirit of the Three Strikes law and should therefore be treated as if he had not previously been convicted of the qualifying felony. (*Carrasco*, at p. 993.)

Defendant's qualifying strike is a 1992 adjudication for assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)), stemming from defendant's attack on a girl using a pole. Following his juvenile adjudication, defendant went on to live a life of crime, with a February 1994 conviction for carrying a concealed weapon (former Pen. Code, § 12025, as amended by Stats. 1992, ch. 1340, § 6), and convictions for driving under the influence in June 2002, January 2003, March 2004, and September 2007. (Veh. Code, § 23152.) He was also convicted in April 2006 of driving on a suspended license. (Veh. Code, § 14601.2.) Defendant's 2007 conviction for driving under the influence carried a prison term of 16 months. He received probation and jail terms for his other offenses. Defendant's current conviction came about after he was pulled over for making a left-hand turn into oncoming traffic. His blood alcohol content was one and a half times the legal limit.<sup>2</sup> (Veh. Code, § 23152, subd. (b).)

In his *Romero* motion, defendant argued he was a minor when he committed his strike offense, he cooperated with officers during his arrest for his current offenses, and "for the first time in his life, [he] appears to be ready to begin to place his family life

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<sup>2</sup> Defendant had a blood alcohol content of 0.128 percent in his initial screening, with a later test showing a blood alcohol content of 0.11 percent.

outside of prison, especially his relationship with his son, as a higher priority in his life than alcohol.” In considering defendant’s motion, the trial court acknowledged that his strike conviction was “remote in time and . . . was committed as a minor.” However, the court was concerned with defendant’s “recidivism . . . subsequent to that prior strike up to and including the recent case.” The court found that defendant received a lenient sentence for his 2007 conviction, but had made no effort to address his drinking problem and continued to “endanger lives of others by getting on the roadway in a vehicle.” The court stated that it understood its discretion under *Romero*, but found that defendant was “within that spirit of the law.”

The trial court clearly understood the scope of its discretion and decided not to dismiss the juvenile strike allegation because defendant had not lived a crime-free life after his 1992 offense but instead, time after time, endangered others by driving under the influence. Defendant’s conduct does not demonstrate that he has learned any lesson from his repeated convictions. The trial court did not err in finding defendant is the kind of criminal the Three Strikes law was intended to punish, notwithstanding his stated remorse and desire to improve his life. (See *People v. Williams* (1998) 17 Cal.4th 148, 163.)

#### **DISPOSITION**

The judgment is affirmed.

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GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.